

§ 40.81

(7) On a confirmation test and, where applicable, on a screening test, the sequential test number or alcohol concentration displayed on the EBT is not the same as the sequential test number or alcohol concentration on the printed result.

(b) [Reserved]

[59 FR 7357, Feb. 15, 1994, as amended at 59 FR 43002, Aug. 19, 1994]

§40.81 Availability and disclosure of alcohol testing information about individual employees.

(a) Employers shall maintain records in a secure manner, so that disclosure of information to unauthorized persons does not occur.

(b) Except as required by law or expressly authorized or required in this section, no employer shall release covered employee information that is contained in the records required to be maintained by this part or by DOT agency alcohol misuse rules.

(c) An employee subject to testing is entitled, upon written request, to obtain copies of any records pertaining to the employee's use of alcohol, including any records pertaining to his or her alcohol tests. The employer shall promptly provide the records requested by the employee. Access to an employee's records shall not be contingent upon payment for records other than those specifically requested.

(d) Each employer shall permit access to all facilities utilized in complying with the requirements of this part and DOT agency alcohol misuse rules to the Secretary of Transportation, any DOT agency with regulatory authority over the employer, or a state agency with regulatory authority over the employer (as authorized by DOT agency regulations).

(e) When requested by the Secretary of Transportation, any DOT agency with regulatory authority over the employer, or a state agency with regulatory authority over the employer (as authorized by DOT agency regulations), each employer shall make available copies of all results for employer alcohol testing conducted under the requirements of this part and any other information pertaining to the employer's alcohol misuse prevention program. The information shall include

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name-specific alcohol test results, records and reports.

(f) When requested by the National Transportation Safety Board as part of an accident investigation, an employer shall disclose information related to the employer's administration of any post-accident alcohol tests administered following the accident under investigation.

(g) An employer shall make records available to a subsequent employer upon receipt of a written request from a covered employee. Disclosure by the subsequent employer is permitted only as expressly authorized by the terms of the employee's written request.

(h) An employer may disclose information required to be maintained under this part pertaining to a covered employee to that employee or to the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual, and arising from the results of an alcohol test administered under the requirements of this part, or from the employer's determination that the employee engaged in conduct prohibited by a DOT agency alcohol misuse regulation (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the employee).

(i) An employer shall release information regarding a covered employee's records as directed by the specific, written consent of the employee authorizing release of the information to an identified person. Release of such information is permitted only in accordance with the terms of the employee's consent.

§40.83 Maintenance and disclosure of records concerning EBTs and BATs.

(a) Each employer or its agent shall maintain the following records for two years:

(1) Records of the inspection and maintenance of each EBT used in employee testing;

(2) Documentation of the employer's compliance with the QAP for each EBT it uses for alcohol testing under this part;

(3) Records of the training and proficiency testing of each BAT used in employee testing;

(4) The log books required by § 40.59(c).

(b) Each employer or its agent shall maintain for five years records pertaining to the calibration of each EBT used in alcohol testing under this part, including records of the results of external calibration checks.

(c) Records required to be maintained by this section shall be disclosed on the same basis as provided in § 40.81.

Subpart D—Non-Evidential Alcohol Screening Devices

SOURCE: 60 FR 19679, Apr. 20, 1995, unless otherwise noted.

§ 40.91 Authorization for use of non-evidential alcohol screening devices.

Non-evidential alcohol screening tests, performed using screening devices included by the National Highway Traffic Safety Administration on its conforming products list for non-evidential screening devices, may be used in lieu of EBTs to perform screening tests required by operating administrations' alcohol testing regulations. Non-evidential screening devices may not be used for confirmation alcohol tests, which must be conducted using EBTs as provided in subpart C of this part.

§ 40.93 The screening test technician.

(a) Anyone meeting the requirements of this part to be a BAT may act as a screening test technician (STT), provided that the individual has demonstrated proficiency in the operation of the non-evidential screening device he or she is using.

(b) Any other individual may act as an STT if he or she successfully completes a course of instruction concerning the procedures required by this part for conducting alcohol screening tests. Only the Department of Transportation model course, or a course of instruction determined by the Department of Transportation's Office of Drug Enforcement and Program Compliance to be equivalent to it, may be used for this purpose.

(c) With respect to any non-evidential screening device involving changes, contrasts, or other readings that are indicated on the device in terms of color, STTs shall, in order to

be regarded as proficient, be able to discern correctly these changes, contrasts or readings.

(d) The STT shall receive additional training, as needed, to ensure proficiency, concerning new or additional devices or changes in technology that he or she will use.

(e) The employer or its agent shall document the training and proficiency of each STT it uses to test employees and maintain the documentation as provided in § 40.83.

(f) The provisions of § 40.51(b) and (c); § 40.57; § 40.59; § 40.61; § 40.63 (e)(1)–(2), (f), (g), and (h); § 40.69; and § 40.81; and other provisions, as applicable, of this part apply to STTs as well as to BATs.

§ 40.95 Quality assurance plans for non-evidential screening devices.

(a) In order to be used for alcohol screening tests subject to this part, a non-evidential screening device shall have an approved quality assurance plan (QAP) developed by the manufacturer and approved by the National Highway Traffic Safety Administration (NHTSA).

(1) The plan shall designate the method or methods to be used to perform quality control checks; the temperatures at which the non-evidential screening device shall be stored and used, as well as other environmental conditions (*e.g.*, altitude, humidity) that may affect the performance of the device; and, where relevant, the shelf life of the device.

(2) The QAP shall prohibit the use of any device that does not pass the specified quality control checks or that has passed its expiration date.

(b) The manufacturers' instructions on or included in the package for each saliva testing device shall include directions on the proper use of the device, the time frame within which the device must be read and the manner in which the reading is made.

(c) The employer and its agents shall comply with the QAP and manufacturer's instructions for each non-evidential screening device it uses for alcohol screening tests subject to this Part.